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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re JOE A., et al., Persons Coming Under
the Juvenile Court Law.

B234035
(Los Angeles County
Super. Ct. No. CK86914)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JOE A.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Patricia Spear, Judge. (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice
pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for
Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant
County Counsel, and Emery El Habiby, Deputy County Counsel, for Plaintiff and
Respondent.

INTRODUCTION

A father appeals from the dependency court's order finding his children to be dependents within the meaning of Welfare and Institutions Code section 300 and ordering his removal from the home. We affirm the dependency court's findings pursuant to Welfare and Institutions Code section 300. However, to the extent the father challenges his removal from the home, this issue is moot because the dependency court's subsequent order allowed the father's return to the home.

FACTUAL AND PROCEDURAL SUMMARY

Six-year-old Joe A. Jr. came to the attention of the Department of Children and Family Services on March 3, 2011, after he arrived late to school, with his "left eye, eyebrow, eyelid, and forehead just above the eyebrow . . . red." His upper left cheek was also "puffy with white patches." Joe said his father hit him with his fist, and his mother was angry at his father for hitting him. Joe said his father was drunk when he hit him. A social worker made an unannounced visit to the home to investigate the allegations and found Joe playing in the front yard. When Joe came to the front gate and opened the door for the social worker, she saw marks and bruises on his eye. She went to Joe's apartment and asked who was home. Joe answered, "My dad but he is mad." When the social worker asked why, he said, "Because I've been a bad boy."

When Joe opened the door, Joe Sr. yelled, "What are you doing!" The social worker identified herself and asked to speak with Joe's parents. Joe Sr. said Joe's father was not home and Joe's mother was at work. When the social worker asked Joe if Joe Sr. was his dad, Joe said "yes." The social worker informed Joe Sr. of the allegations and said the Department had to investigate them. She asked for his cooperation and said she only wanted to interview him. Joe Sr. appeared irritated and angry and said he was not having a good day. He said Joe had gotten into a fight at school and that was the reason his eye was swollen. Joe appeared scared.

Joe Sr. refused to sit down to speak with the social worker on a bench in front of the door, and when she asked for his name and date of birth, he said, "I don't have to tell

you anything!” He called Joe’s mother (F.M.) and told her to “come home now.” Joe Sr. said, “This is bullshit, I’m not saying shit.” When the social worker said she would call law enforcement if Joe Sr. continued to be aggressive and did not cooperate, he said, “Do what the fuck you want” and ran back inside.

When the social worker contacted law enforcement for assistance, Joe Sr. ran past her with an infant in a car seat (Joe’s sister Leah) and Joe. Joe Sr. yelled at Joe to “Hurry up and get in the car!” and sped off with the children. Police officers arrived at the scene and contacted Joe Sr. on his cellular phone, and he eventually agreed to return. Joe Sr. was then handcuffed and detained.

When F.M. arrived, the social worker explained the allegations. F.M. said she had taken Joe to school late that day, but said he had not been hit. Asked if there had been an argument between her and Joe Sr., she said, “Oh yes, I always yell at him.” When the social worker asked F.M. how Joe was disciplined, she said his toys were taken, they would talk and they would spank him. She said Joe Sr. used his ““mean voice”” and Joe was also hit with a belt. The last time was a few weeks earlier. She denied leaving any marks; she said they “d[o] not hit him hard[;] it is just to scare him.” She said neither she nor Joe Sr. slapped, punched or kicked Joe. When the social worker told F.M. the Department was detaining the children from Joe Sr. and he had to leave the home until the court date the following week, she became distraught and said, “Where is he going to go dammit!”

The social worker and an officer spoke with Joe separately. He was crying and appeared distraught. He said he got into a fight with a boy at school and that was the reason his “eye hurt.” The social worker noted some difficulty understanding Joe’s speech. The social worker asked Joe about his father. He said Joe Sr. got angry because Joe got into a fight at school. When the social worker asked what his father said about this fight, Joe showed the officer how Joe Sr. punched him in the stomach with a closed fist. The social worker asked Joe what had happened with the nurse at school in the

morning. Joe said his father was angry in the morning because Joe did not take out the trash. He said Joe Sr. did not punch him in the morning; he punched him after school.

Asked if it was the first time his father had hit him, Joe said his father “punches him ‘sometimes.’” He said Joe Sr. also “hits him with a belt.” “‘Sometimes it’s a punch, the belt, or both.’” Asked if his father hit him often, Joe said, “He gets mad sometimes.” The social worker and officer conducted a body check and observed a swollen left eye with a scratch and mark that “may” be a bruise on his left eye. Both eyes were red. Asked about his mother, Joe smiled and said he likes her and feels safe with her. The social worker noted Joe sought her attention and appeared comfortable with her. She told F.M. the Department would have to remove the children from her care if she failed to protect them from Joe Sr. She agreed to abide by the plan and ensure Joe Sr. stayed out of the home. Joe Sr. agreed to leave and stay with his brother-in-law. He was not arrested because Joe said the marks on his face occurred at school and there were no visible marks on his stomach.

F.M. acknowledged arguments with Joe Sr. that would escalate to yelling and cursing but not in front of the children, and she denied any physical altercations. She told both the social worker and one of the police officers she and Joe Sr. spanked Joe Jr. with their hand or “with a small belt.” She said she and Joe Sr. drank alcohol occasionally. She said Joe Sr. had a criminal record but refused to identify the substance.¹

The following day, the social worker spoke with the school nurse who had originally reported Joe’s injuries (Claudia Yepes). She confirmed that when Joe arrived late for school the day before, the school secretary noticed his eyes and immediately sent him to see the nurse. At that time, Yepes said, there was redness on Joe’s eyelids, puffiness under his eyes and his left eye appeared as if he had been hit. His left eye was

¹ According to the detention report, there was a prior referral for general neglect in January 2006, indicating Joe Sr. and F.M. had been arrested while in a home with a suspected shooter and with drugs accessible to the children on the kitchen table. Joe Sr. was arrested for violating parole, and allegations against Joe Sr. were substantiated.

puffier, there were white patches and there was a circle around Joe's eye. She was not aware of Joe's involvement in any fight the day before. There had been no concerns about Joe or his parents before that day. When she walked Joe back to class after he reported to her office, the nurse asked Joe's teacher if she had any concerns and she did not. The nurse indicated Joe was receiving counseling with the school psychologist (Dr. Molly Onstine) for behavioral problems.

The social worker also spoke with Joe's teacher (Monique O.). She said she did not ask Joe about his eye when he arrived at her class with an ice pack the day before, and he did not say anything to her; when she asked Joe about his eye that morning (March 4), he said his father was angry because of the trash and said, "He hit me for no reason." She said Joe also told her his mother and father were upset. Joe's teacher said Joe had many behavioral problems at school, and his parents appeared concerned, but "they also stated they do not know what to do." She said Joe was physically aggressive and would hit, punch, slap, kick and use foul language at school. He was receiving speech therapy and was involved in a program called "Amigos" that "teaches children how to resolve conflict in an appropriate manner."

The school psychologist (Onstine) told the social worker she met with Joe after the nurse checked his eye and gave him an ice pack; she saw a mark on his left eye and it appeared red. She did not ask Joe what had happened and he did not say anything about his eye. Joe had never said anything about violence at home; Onstine's treatment focus was behavior modification, and she met with Joe for weekly counseling. Joe was physically aggressive and would punch and slap at school. She said she had begun treating Joe on January 20 and had met with him four times since then. She had placed him on a "behavioral contract," and he had an altered recess time. She said Joe had an IEP for speech and language impairment. She had asked Joe's parents to participate in Joe's IEP and mental health evaluation but both failed to attend. She said she provided resources for Joe but never received a call back and had never met Joe's parents.

When Joe was physically examined and found to have a number of bruises or marks on his body, Joe offered a number of explanations: “little puppy bit me,” “I fell at school,” “I don’t know what happened,” “I was playing tag and fell,” “my little friend hit me with a stick,” “I hit the wall because I wasn’t looking,” and “I fell and had stitches.” During his interview, Joe said, “I like living at home. I’m afraid of my dad because he hits me with hand (shows open hand) on my butt with pants on. My mom doesn’t hit me and my dad doesn’t hit me with anything else or anywhere else.”

The Department filed a petition alleging as follows: Joe and Leah were at substantial risk of harm within the meaning of Welfare and Institutions Code section 300, subdivisions (a), (b) and (j) because Joe Sr. had physically abused Joe by punching him in the stomach and face with his fists, inflicting marks on Joe’s eye and causing swelling on his cheek. On prior occasions, Joe Sr. struck Joe with belts and with his fists. On prior occasions, F.M. physically abused Joe by striking him with a belt. Such physical abuse was excessive and caused Joe unreasonable pain and suffering. F.M. knew of the abuse but failed to protect him. Such physical abuse of Joe and F.M.’s further failure to protect Joe placed Joe and Leah at risk. (All further statutory references are to the Welfare and Institutions Code.)

At the detention hearing on March 8, 2011, the dependency court ordered Joe and Leah released to F.M. pending the next hearing. The Department was ordered to provide F.M. with family maintenance services and to provide Joe with family reunification services. In addition, the court ordered a mental health and/or developmental assessment, with the Department directed “to arrange for a psychological test of Joe to rule out autism and A.D.D.” Joe Sr. was to have monitored visits with his children at least twice per week.

According to the Department’s report for the upcoming jurisdiction and disposition hearing, Joe Sr. was interviewed on March 23. At that time, he said F.M. dropped Joe off at school on the morning of March 3, just like any other day. He denied he had punched, struck or caused any physical harm to Joe. He admitted spanking Joe on

the day the social worker came to his door but denied using a closed fist. He said he was a “social drinker” but denied any substance abuse. “Sometimes during the week I drink a six-pack or a twelve-pack when the Laker game is on but not all to myself. My girlfriend or our company will have some.”

When the social worker asked Joe Sr. why he had denied he was Joe’s father when the social worker arrived to investigate the referral, he said, “[She] showed up at my door. She said she was from Social Services. It was another problem I didn’t want to deal with. I was having a bad day. I had just spanked my son, his face was red from crying, I didn’t want to deal with her.” At the emergency room and at a TDM meeting on March 7, Joe Sr. had displayed his temper, and Joe Sr. and F.M. left before the meeting after Joe Sr. was talking over the facilitator but later returned. He appeared angry and upset about the Department’s involvement at the start of the interview but the social worker explained how he would benefit from anger management and parenting classes. The social worker noted Joe Sr.’s temper was of great concern and worried about Joe Sr. taking his anger out on the children when things went wrong; she concluded Joe Sr. needed help to learn to manage his anger and develop coping skills.

In her March 28 interview, F.M. said they had been running late on March 3, 2011. She did not see anything on Joe’s face when she dropped him off at school or later when she got home. She said she had never seen Joe Sr. hit Joe other than spanking him on his bottom open-handed. She said Joe Sr. had called her that night around 5:00 or 6:00 p.m. and said Joe had gotten into a fight at school. Joe Sr. was angry because Joe was always getting in trouble and said he had spanked Joe on the butt. After the social worker came, F.M. said, she asked Joe why he had said Joe Sr. hit him in the stomach, he said he was telling stories. F.M. said she never hit Joe with a belt; she only showed it to him when he misbehaved.

Joe was interviewed on March 28 and said his eye injury happened in a fight after school when another student kicked him in the buttocks. On another occasion, Joe

reported he had been running and slipped on a rock which caused a bruise and a mark on his buttocks (which he denied his father had caused).

Joe said his father would hit him with an open hand and would threaten to take his guns or PlayStation away. He said his dad hit him when he got home from school on March 3, but said his father did not hit him on the face; he said two former friends had slapped him at school. He insisted his father had not punched him or hit him with a belt. “I was making up stories about my daddy.” It appeared Joe had been coached and that the case had been discussed with him. He kept repeating that his father only hit him on the butt with an open hand and not with the belt. He said his friends caused the marks on his face, not his father. According to Dr. Kim who performed the court-ordered assessment, both Joe Sr. and Joe had aggressive personality traits, and the plan was to refer Joe for an ADHD assessment and possible medication.

Joe Sr. was offered free parenting classes and weekly individual therapy to address anger management for \$10 per session with a \$25 enrollment fee, but Joe Sr. said he was unemployed and could not afford the fees. Joe Sr.’s therapist reported therapy fees had already been reduced and could not be reduced any further and objected to Joe Sr. bringing his infant daughter to his therapy sessions as inappropriate; according to the therapist, Joe Sr. said it was “unfair” he had to attend therapy. On March 24, when Joe Sr. brought his daughter with him, the social worker called F.M. to ask if she was allowing Joe Sr. to have unmonitored visits with the children; she denied doing so. When the social worker asked Joe Sr. if he was having unmonitored visits with the children, he got upset and said he was also upset the social worker had asked F.M. about Joe Sr.’s criminal background. When the social worker asked Joe Sr. for a “Yes” or “No” answer to her question about unmonitored visits, he said, “Now what Yes, I did.” He became irate and said the Department did not understand what it was doing. In a condescending manner and with no apparent concern his children might be detained, he kept repeating, “Now what?” After being told he had violated a court order, Joe Sr.

appeared unconcerned. The social worker reiterated to F.M. that Joe Sr. was not to have unmonitored contact with the children as it could jeopardize placement with F.M.

The social worker noted the conflicting witness statements about the bruises and marks on Joe's face on March 3 and did not recommend Joe Sr.'s return to the home. She recommended the children remain with F.M., receiving family maintenance services and recommended reunification services for Joe Sr. to include parent education, individual counseling to address anger management issues and weekly random and on-demand testing for alcohol and drugs.

Following the April 12 jurisdictional hearing, the dependency court ordered Joe released to F.M. pending the next hearing on June 7.

On June 7, the dependency court heard testimony from Joe, F.M. and Joe Sr. Joe Sr. said Joe did not go to school with a puffy eye on March 3; he said he only learned of Joe's injury after Joe came home from school and the social worker arrived. He admitted spanking Joe but only with his hand over Joe's clothes. He denied hitting Joe in the face or stomach, denied spanking him with a belt or fist and denied leaving any marks on his son.

F.M. denied having said she had hit Joe with a belt six weeks before the social worker's visit. She said she had never seen Joe Sr. use a belt on Joe or hit him other than spanking him on the buttocks. She said she and Joe Sr. sometimes scared Joe with a belt by talking about it but never hitting him with it.

Joe testified in chambers. He had turned seven and was in first grade. He denied he had ever been in a fight at school; someone had claimed he had but he did not remember what happened. He said he did not recall ever saying his father hit him with his fist or that his mother was mad at his father because he hit Joe. He said his father had never hit him with his fist. He said his parents sometimes got upset when he got in trouble, but denied his mother or father had ever spanked him. He said his father had never spanked him on the bottom. He said his mother had never spanked him or hit him with a belt. He said no one ever spanked him at home.

The dependency court sustained the petition as true under subdivisions (a), (b) and (j) of section 300, declaring Joe a dependent child under subdivisions (a) and (b) and Leah a dependent child under subdivisions (a), (b) and (j). By clear and convincing evidence, the dependency court found a substantial danger to the children and no reasonable means to protect them without removing them from Joe Sr.'s custody. Joe and Leah were placed with F.M. The Department was ordered to provide family maintenance services for F.M. and reunification services for Joe Sr. with Department-approved monitored visitation for Joe Sr.

The dependency court set a progress hearing in three months to address the prospect of Joe Sr.'s return to the home.²

Joe Sr. appeals.

DISCUSSION

Substantial Evidence Supports the Dependency Court's Order.

According to Joe Sr., the dependency court was not presented with sufficient evidence to support its jurisdictional and dispositional orders. (Welf. & Inst. Code, § 300, subds. (a), (b), (j); § 361, subd. (c).) We disagree.

Subdivision (a) of section 300 states that the dependency court may establish jurisdiction over a child when: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm. For purposes of this subdivision, 'serious physical harm' does not include reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury." (§ 300, subd. (a).)

² We have requested and reviewed the dependency court's subsequent minute orders and, as relevant to this appeal, note that on September 15, 2011, Joe Sr. was allowed unmonitored visitation, and on December 6, 2011, Joe Sr. was allowed to return home.

Dependency court jurisdiction is proper pursuant to subdivision (b) where: “The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.” (§ 300, subd. (b).)

Under subdivision (j) of section 300, the dependency court properly exercises jurisdiction where: “The child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.” (§ 300, subd. (j).)

Joe Sr. says there is insufficient evidence to support the section 300, subdivision (a), (b), and (j) allegations because there is no evidence that he ever inflicted serious physical harm on Joe or that either child was at risk of serious physical harm in the future. Joe Sr. concedes that Joe had marks and bruises on his eye but says these injuries did not constitute “serious physical harm” and could not support the determination the children were at risk of such harm in the future. Joe ignores the record and the standard of review.

The dependency court noted that Joe’s examination revealed “linear marks on his legs and line marks on his back and marks on his hand and those suggest something consistent with hitting with a belt to the court.” Further, considering all of the evidence, the dependency court stated, “I do think . . . on the day in question, March 3rd, [Joe Sr.] lost it and I think that he did punch the child.” The court commented, “[Joe Sr.] said he didn’t want to hear about it, not that it didn’t occur. . . . I’m sure there are many different ways to deal with him and a belt is not one of them.” Numerous inconsistencies in the witnesses’ accounts included Joe’s testimony that neither of his parents had ever spanked

him despite testimony from both Joe Sr. and F.M. admitting that they had done so. The dependency court could reasonably conclude that without intervention, the severity of Joe's punishment could escalate further, increasing the risk to Joe as well as Leah. Accordingly, there was sufficient evidence to assume jurisdiction of the children based on the physical abuse allegations. (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 438-439.)

Joe Sr. also says the true finding he had physically abused Joe did not support the trial court's order removing the children from his custody pursuant to section 361, subdivision (c).³ After determining Joe Sr. had physically abused his son and needed to address his anger and denial at the June 7, 2011 hearing, the dependency court removed the children from Joe Sr.'s custody. However, six months later, on December 6, 2011, the dependency court terminated the June 7, 2011 order. As of December 6, 2011, the prior "home of mother order" was modified to a "home of parents order," conditioned on Joe Sr.'s and F.M.'s compliance with their case plan. Therefore, Joe Sr.'s challenge to the dependency court's order removing him from the home is moot.

DISPOSITION

The order is affirmed with respect to the dependency court's findings under Welfare and Institutions Code section 300. To the extent Joe Sr. challenges the

³ "A dependent child may not be taken from the physical custody of his or her parents . . . , unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), inclusive, . . . : (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody. . . . The court shall consider, as a reasonable means to protect the minor, the option of removing an offending parent or guardian from the home. The court shall also consider, as a reasonable means to protect the minor, allowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm." (§ 361, subd. (c).)

dependency court's order removing the children from his custody pursuant to section 361, subdivision (c), that issue is moot.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.